

BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD

IN THE MATTER OF:

MUKILTEO LODGE LLC d/b/a
MUKILTEO LODGE SPORTS GRILLE

LICENSEE

LICENSE NO. 405490
AVN NO. 3G3179B

and

ERIC WILSON

MAST PERMIT HOLDER

PERMIT NO. 120 483 074
AVN NO. 3G3179B

LCB NOS. L-24,799
L-24,795

OAH NO. 2014-LCB-0042

FINAL ORDER OF THE BOARD

The above-captioned matter coming on regularly before the Board, and it appearing that:

1. The Liquor Control Board issued a complaint dated June 16, 2014, alleging that on or about June 28, 2013, the above-named Licensee or employee(s) thereof permitted an apparently intoxicated person to possess and/or consume liquor on the licensed premises, contrary to WAC 314-16-150; and the Liquor Control Board issued a complaint dated June 16, 2014, alleging that on or about June 28, 2013, the above-named Permit Holder, thereof, permitted an apparently intoxicated person to consume liquor on the licensed premises, contrary to WAC 314-16-150;

2. The Licensee and Permit Holder made timely requests for a hearing.

3. An administrative hearing was held on October 29, 2014 before Administrative Law Judge Jane Cantor Shefler with the Office of Administrative Hearings.

FINAL ORDER OF THE BOARD
LCB NO. L-24,799 & L-24,795
MUKILTEO LODGE SPORTS GRILLE
AND ERIC WILSON
LICENSE NO. 405490;
PERMIT NO. 120 483 074

Page 1 of 4

4. At the hearing, the Education and Enforcement Division of the Board was represented by Assistant Attorney General Jennifer Elias. The Licensee was represented by Charles Rullman and Bryce Blum, Attorneys at Law.
5. On November 25, 2014 Administrative Law Judge Jane Cantor Shefler entered her Findings of Fact, Conclusions of Law and Initial Order in this matter which sustained both Complaints.
6. On December 15, 2014, the Licensee filed Respondents' Petition for Review of Initial Order. Enforcement Division's Reply to Licensee's and Permit Holder's Petition for Review of the Initial Order was received on December 23, 2014.
7. The entire record in this proceeding was presented to the Board for final decision, and the Board having fully considered said record and being fully advised in the premises;

NOW, THEREFORE, IT IS HEREBY ORDERED that the Administrative Law Judge's Findings of Fact, Conclusions of Law and Initial Order are, AFFIRMED and adopted as the Findings of Fact, Conclusions of Law and Final Order of the Board,

IT IS HEREBY FURTHER ORDERED that the liquor license privileges granted to Mukilteo Lodge LLC d/b/a Mukilteo Sports Grill, License No. 405490, are hereby suspended for a term of seven (7) days. The suspension will take place from 10:00 a.m. on Thursday, April 2, 2015 until 10:00 a.m. on Thursday, April 9, 2015. Failure to comply with the terms of this order will result in further disciplinary action.

ALSO, IT IS HEREBY FURTHER ORDERED that the liquor license privileges granted to Eric Wilson, Permit Number 120483074, are hereby suspended for a term of five (5) days. In lieu of a

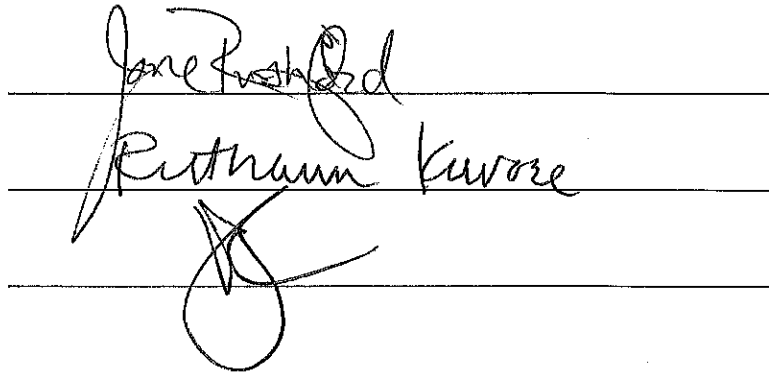
license suspension, the Permit Holder may pay a monetary penalty in the amount of one hundred dollars (\$100.00) due within 30 days of this order. If timely payment is not received, the suspension will take place from 10:00 a.m. on Thursday, April 2, 2015 until 10:00 a.m. on Tuesday, April 7, 2015. Failure to comply with the terms of this order will result in further disciplinary action.

Payment in reference to this order should be sent to:

**Washington State Liquor Control Board
Financial Division
PO Box 43085
Olympia, WA 98504-3085**

DATED at Olympia, Washington this 10th day of February, 2015.

WASHINGTON STATE LIQUOR CONTROL BOARD

Three handwritten signatures are written on three horizontal lines. The first signature is 'Jane Rushford', the second is 'Ruthann Kuore', and the third is a stylized signature.

Reconsideration. Pursuant to RCW 34.05.470, you have ten (10) days from the mailing of this Order to file a petition for reconsideration stating the specific grounds on which relief is requested. A petition for reconsideration, together with any argument in support thereof, should be filed by mailing or delivering it directly to the Washington State Liquor Control Board, Attn: Kevin McCarroll, 3000 Pacific Avenue Southeast, PO Box 43076, Olympia, WA 98504-3076, with a copy to all other parties of record and their representatives. Filing means actual receipt of the document at the Board's office. RCW 34.05.010(6). A copy shall also be sent to Mary M.

FINAL ORDER OF THE BOARD
LCB NO. L-24,799 & L-24,795
MUKILTEO LODGE SPORTS GRILLE
AND ERIC WILSON
LICENSE NO. 405490;
PERMIT NO. 120 483 074

Page 3 of 4

Tennyson, Senior Assistant Attorney General, 1125 Washington St. SE, P.O. Box 40110, Olympia, WA 98504-0110. A timely petition for reconsideration is deemed to be denied if, within twenty (20) days from the date the petition is filed, the agency does not (a) dispose of the petition or (b) serve the parties with a written notice specifying the date by which it will act on the petition. An order denying reconsideration is not subject to judicial review. RCW 34.05.470(5). The filing of a petition for reconsideration is not a prerequisite for filing a petition for judicial review.

Stay of Effectiveness. The filing of a petition for reconsideration does not stay the effectiveness of this Order. The Board has determined not to consider a petition to stay the effectiveness of this Order. Any such request should be made in connection with a petition for judicial review under chapter 34.05 RCW and RCW 34.05.550.

Judicial Review. Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review of this Order shall be filed with the appropriate court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542.

Service. This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19).



**Washington State
Liquor Control Board**

February 11, 2015

Charles P. Rullman
Bryce C. Blum,
Attorneys for Licensee
Foster Pepper PLLC
1111 Third Ave Ste 3400
Seattle, WA 98101-3299

Jennifer Elias, AAG
GCE Division, Office of Attorney General
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100

Shawn Roten, Representative for Licensee
Mukilteo Lodge LLC
d/b/a Mukilteo Lodge Sports Grille
7928 Mukilteo Speedway #101
Mukilteo, WA 98275-2607

Eric Wilson, Permit Holder
4304 152nd St SW
Lynnwood, WA 98087-6136

RE: FINAL ORDER OF THE BOARD
LICENSEE: Mukilteo Lodge LLC
TRADE NAME: Mukilteo Lodge Sports Grille
LOCATION: 7928 Mukilteo Speedway #101, Mukilteo, WA 98275-2607
LICENSE NO. 405490
PERMIT HOLDER: Eric Wilson
MAST PERMIT NO. 120 483 074
LCB HEARING NOS. L-24,799 AND L-24,795
OAH NO. 2014-LCB-0042
AVN NO. 3G3179A AND 3G3179B
UBI: 602-924-158-001-0001

Dear Parties:

Please find the enclosed Final Order of the Board and Declaration of Service by Mail in the above-referenced matter.

The applicable monetary penalty is due by Monday, March 16, 2015. The address for payment is WSLCB, P.O. Box 43085, Olympia, WA 98504-3085. Please label the check with your Permit Number and Violation Notice Number. If you have any questions, please contact me at (360) 664-1602.

Sincerely,

Kevin McCarroll
Adjudicative Proceedings Coordinator

KM:mg

Enclosures (2)

cc: Mount Vernon and Mountlake Terrace Enforcement and Education Division, WSLCB
Lisa Red, Enforcement and Education Division, Headquarters, WSLCB

WASHINGTON STATE LIQUOR CONTROL BOARD

IN THE MATTER OF:

MUKILTEO LODGE LLC d/b/a
MUKILTEO LODGE SPORTS GRILLE

LICENSEE

LICENSE NO. 405490
AVN NO. 3G3179A

and

ERIC WILSON

MAST PERMIT HOLDER

PERMIT NO. 120 483 074
AVN NO. 3G3179B

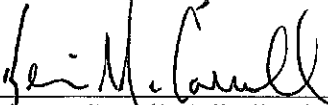
LCB NO. L-24,799
OAH NO. 2014-LCB-0042

DECLARATION OF SERVICE BY
MAIL

I certify that I caused a copy of the FINAL ORDER OF THE BOARD in the above-referenced matter to be served on all parties or their counsel of record by US Mail Postage Prepaid via Consolidated Mail Service for applicants and licensees, by electronic mail for WSLCB offices, and Campus Mail via Consolidated Mail Services for state offices on the date below to:

CHARLES P. RULLMAN BRYCE C. BLUM, ATTORNEYS FOR LICENSEE FOSTER PEPPER PLLC 1111 THIRD AVE STE 3400 SEATTLE, WA 98101-3299	OFFICE OF THE ATTORNEY GENERAL MAIL STOP 40100, GCE DIVISION JENNIFER ELIAS, ASSISTANT ATTORNEY GENERAL
SHAWN ROTEN MUKILTEO LODGE LLC d/b/a MUKILTEO LODGE SPORTS GRILLE 7928 MUKILTEO SPEEDWAY #101 MUKILTEO, WA 98275-2607	ERIC WILSON, PERMIT HOLDER 4304 152 ND ST SW LYNNWOOD, WA 98087-6136

DATED this 11th day of February, 2015, at Olympia, Washington.


Kevin McCarroll, Adjudicative Proceedings Coordinator

11.25.14

RECEIVED

DEC 15 2014

Liquor Control Board
Board Administration

STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE LIQUOR CONTROL BOARD

In the Matters of:

**MUKILTEO LODGE LLC d/b/a MUKILTEO
LODGE SPORTS GRILLE,**

License No. 405490
AVN No. 3G3179A

Respondent,

and

ERIC WILSON,

Permit No. 120 483 074
AVN No. 3G3179B

Respondent.

OAH Docket No. 2014-LCB-0042

Agency Nos. L-24,799
L-24,795

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
and
INITIAL ORDER**

I. ISSUES PRESENTED

1.1 On or about June 28, 2013, did the Respondent Mukilteo Lodge LLC d/b/a Mukilteo Lodge Sports Grille or its employees permit an apparently intoxicated person to possess and/or consume liquor on the licensed premises, in violation of WAC 314-16-150, as alleged in Complaint No. L-24,799, dated June 16, 2014?

1.2 If so, what is the appropriate penalty?

1.3 On or about June 28, 2013, did the Respondent Eric Wilson permit an apparently intoxicated person to consume liquor on the licensed premises, in violation of WAC 314-16-150, as alleged in Complaint No. L-24,795, dated June 16, 2014?

1.4 If so, what is the appropriate penalty?

II. ORDER SUMMARY

2.1 On or around June 28, 2013, the Respondent Mukilteo Lodge LLC d/b/a Mukilteo Lodge Sports Grille and/or its employees served alcohol to an apparently

intoxicated person, and/or permitted an apparently intoxicated person to possess and/or consume liquor, on the licensed premises, in violation of WAC 314-16-150.

2.2 Under WAC 314-29-020, the appropriate penalty is a seven-day suspension of the liquor license.

2.3 On or about June 28, 2013, Respondent Eric Wilson permitted an apparently intoxicated person to consume liquor on the licensed premises, in violation of WAC 314-16-150, as alleged in Complaint No. L-24,795, dated June 16, 2014.

2.4 Under WAC 314-17-105, the appropriate penalty is a five (5) suspension of the MAST permit or a monetary penalty of One Hundred Dollars (\$100.00).

III. HEARING

3.1 **Hearing Date:** October 29, 2014

3.2 **Administrative Law Judge:** Jane Cantor Shefler

3.3 **Respondents:** Shawn Roten, Owner, was present on behalf of Mukilteo Lodge LLC d/b/a Mukilteo Lodge Sports Grille

3.3.1 **Representatives:** Charles Rullman and Bryce Blum, Attorneys at Law, Foster Pepper LLC

3.3.2 **Witnesses:**

3.3.2.1 Eric Wilson, Respondent/Employee

3.3.2.2 Whitney Paterno, Former Employee
(appeared by telephone)

3.3.2.3 Ryan Hubbard, Customer

3.4 **Agency:** Liquor Control Board ("Board")

3.4.1 **Representative:** Jennifer Elias, Assistant Attorney General

3.4.2 **Witnesses:**

3.4.2.1 Sergeant Steve Grassfield, Liquor Enforcement Officer

3.4.2.2 Officer Steve Telstad, Liquor Enforcement Officer

3.4.3 **Observer:** Aryna Anderson, Assistant Attorney General

3.5 **Exhibits:** Board Exhibits 1 through 8, as well as Respondents Exhibits A through L, were admitted into the record.

3.6 **Non-Evidentiary Documents:** The following non-evidentiary documents were filed with OAH and considered by the Administrative Law Judge: The Respondent's Pre-Hearing Statement and the post-hearing submissions of the parties.

3.7 **Close of Record:** At the request of the parties, the record remained open until November 14, 2014, to allow for the submission of written closing statements/post hearing briefs. The parties timely submitted post hearing statements/briefs and the record was closed on November 14, 2014.

IV. FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

Jurisdiction

4.1 On or about July 2, 2013, Liquor Enforcement Officer Steven Grassfield ("Grassfield") served Administrative Violation Notice (AVN) No. 3G3179A on Shawn Roten ("Roten") Owner of Respondent Mukilteo Lodge.

4.2 On or about July 2, 2013, Roten requested an administrative hearing.

4.3 On June 16, 2014, the Board issued Complaint No. 24,799, regarding the conduct alleged AVN No. 3G3179A.

4.4 On or about July 2, 2013, Grassfield served Administrative Violation Notice (AVN) No. 3G3179B¹ on Roten, who accepted service on behalf of Respondent Eric Wilson ("Wilson").

4.5 On or about July 5, 2013, Wilson requested an administrative hearing.

4.6 On June 16, 2014, the Board issued Complaint No. 24,799, regarding the conduct alleged AVN No. 3G3179B.

¹ On or about July 24, 2013, Grassfield served an amended AVN No. 3G179B on Roten, who again accepted service on behalf of Wilson.

Credibility

4.7 The testimony of the parties conflicted on material points. The undersigned, having carefully considered and weighed all of the evidence, including witness demeanor (as determined by voice, attitude, straightforwardness, unreasonable hesitancy in responses), party motivations, the reasonableness and consistency of testimony throughout the hearing and the totality of the circumstances presented, resolves conflicting testimony in favor of the Board. In making these findings, the Administrative Law Judge need not be persuaded beyond a reasonable doubt as to the true state of affairs, nor must the persuasive evidence be clear, cogent and convincing. The Administrative Law Judge need only determine what most likely happened. *In re Murphy*, Empl. Sec. Comm'r. Dec. 2d 750 (1984).

Mukilteo Lodge Sports Grille

4.8 Mukilteo Lodge Sports Grille ("Mukilteo Lodge" or "Respondent") is a restaurant/lounge located in Mukilteo, Washington that is licensed with the State of Washington to serve spirits, beer and wine. Shawn Roten is the manger/owner of the establishment.

4.9 On or about February 24, 2012, the Mukilteo Lodge was cited for over-service of alcoholic beverages, in violation of State law. The Respondent entered into a settlement with the Liquor Control Board in lieu of appealing the violation and pursuing a hearing with the Office of Administrative Hearings (OAH). Exhibit 8.

Eric Wilson

4.10 Wilson has been a bar manager at the Mukilteo Lodge for approximately two years. He has 15 years experience as a bartender. He holds a server permit, MAST No. 120 483 074. Wilson has not received any prior citations for over-service of a patron.

Over-Service of a Patron

4.11 During the evening of June 28, 2013, Grassfield conducted a routine premises check at the Mukilteo Lodge. He was in plain clothes and did not identify himself to the staff as a Liquor Control Board enforcement officer. He arrived at approximately 8:20 p.m. Exhibit 2, page 1.

4.12 Grassfield entered the lounge and walked to the north end of the bar. He sat at a table near the bar and was in a position to observe patrons. He observed a male later identified as Ryan Hubbard ("Hubbard") sitting at the bar drinking a glass of wine. He was in the company of four other persons.

4.13 Based upon his training, experience and observations, Grassfield believed Hubbard was intoxicated. He had droopy eyes, slow and deliberate movements, talked loudly, was animated, and appeared to be annoying the two women in his group.

4.14 Grassfield had planned to meet Liquor Control Board Officer Steve Telstad ("Telstad") later that evening. He called Telstad, informing him that he had a possible over-service violation and asked him to meet him at the Mukilteo Lodge.

4.15 While waiting for Telstad to arrive, Grassfield continued to observe Hubbard. During this time, Wilson brought the group shots of vodka and Curacao. Hubbard held the shot, but appeared to be debating about drinking it. He took a sip of the drink.

4.16 Hubbard walked outside to smoke a cigarette. Grassfield followed him and observed him in the parking lot. His movements were slow and deliberate; he swayed and staggered slightly.

4.17 Telstad arrived and they followed Hubbard back into the bar. Telstad observed that Hubbard's face appeared flushed and his eyelids droopy. Exhibit 3, page 1.

4.18 Hubbard finished the vodka and Curacao shot. He then walked to the other end of the bar and engaged in a conversation with another patron.

4.19 At that time Grassfield and Telstad approached him. Grassfield identified himself and displayed his badge. He asked Hubbard to go to the lobby/entry area so that they could talk there. Hubbard initially refused to move. Grassfield requested Hubbard's identification, which he refused to provide. To Grassfield, Hubbard appeared dazed. He had turned his back to Grassfield and appeared to be using the bar to maintain his balance. Hubbard was combative and uncooperative. Exhibits 2 and 3.

4.20 A manager, Wesley Reed, encouraged Hubbard to cooperate. Grassfield asked Hubbard several more times for his identification. He eventually took out his Washington Driver's license. When Grassfield attempted to take the license, Hubbard would not let go of it. A little tug-of-war ensued, with Hubbard finally releasing the license. Exhibits 2 and 3.

4.21 Grassfield asked Reed if he thought Hubbard was intoxicated. Reed responded that Hubbard was "buzzed."² Telstad reported that Hubbard admitted to being intoxicated. Exhibit 3, page 1.

4.22 Based upon his experience and observations of Hubbard, Telstad noticed signs of intoxication, including uncooperative behaviors, swaying while standing, blank stare, difficulty comprehending simple instructions, and slow decision making. Exhibit 3, page 1.

4.23 At the time of this incident, Hubbard was a regular patron of the Mukilteo Lodge. Hubbard lived and worked nearby the Lodge. He came to the Lodge on average four times per week. In June 2013, he was a machinist working for a company that produced aerospace parts.

4.24 June 28, 2013 was a Friday. Hubbard was tired from the work week and ready to "cut loose" for the weekend. *Hubbard Testimony.* He arrived at the Mukilteo Lodge at approximately 5:30 p.m. He admits to drinking three beers, plus a glass of wine. He denies that he finished the vodka and Curacao shot.

4.25 Hubbard explained he was uncooperative with the liquor enforcement officers on June 28, 2013 because he was in the middle of a divorce and did not want anything to happen that might affect custody of his children.

4.26 Hubbard, by his own description, has a boisterous personality. He often speaks loudly, gesticulates with his hands, and can be argumentative and opinionated. *Hubbard Testimony; Wilson Testimony.* Reed describes him, though, as "always good-natured." Exhibit L. On June 28, 2013, Wilson did not observe any behaviors out of the ordinary. To him, Hubbard did not have any of the signs of intoxication, including slurred speech, flushed face, mood swings, quick subject changes, or blurry eyes. He was not unduly aggressive, did not use foul language nor was he disrespectful to staff. *Wilson Testimony.*

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² All witness statements agree that Reed used the word "buzzed." They differ, though, as to the adjective attached. Grassfield states Reed responded that Hubbard was "definitely buzzed." Exhibit 2, page 1. Telstad reported that Reed "reluctantly said, "well, he's buzzed." Exhibit 3, page 2. In his statement, Reed states that described Hubbard as "a little buzzed." Exhibit L, page 3. "Buzzed" is a slang word for intoxicated.

V. CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, I make the following Conclusions of Law:

Jurisdiction

5.1 I have jurisdiction to hear and decide this matter under WAC 314-29-010(1)(c); chapter 34.05 RCW, and chapter 10-08 WAC.

Respondents Over-served Hubbard in Violation of Washington State Law.

5.2 No person shall sell any liquor to any person *apparently* under the influence of liquor. RCW 66.44.200. Nor shall any licensee give or otherwise supply liquor to any person *apparently* under the influence of liquor. WAC 314-16-150. (Emphasis added) "Apparently" is defined as "in an apparent manner: seemingly, evidently," "readily perceptible to the senses," and capable of being readily perceived by the sensibilities or understanding as certainly existent or present." *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn.2d 259, 268, 96 P.3d 386 (2004).

5.3 "Apparently" under the influence of alcohol must be demonstrated by direct, observational evidence of the alleged over-service or by reasonable inference deducted from observation shortly after the alleged over-service. *Ensley v. Mollman*, 155 Wn.App. 744, 756, 230 P.3d 599, 605-606 (Wash.App. 2010); *Faust v. Albertson*, 167 Wn.2d 531, 539, 222 P.3d 1208, 1216-17 (2009).

5.4 Respondents argue that deference should be given to licensees or employees in the evaluation of apparent intoxication of regular patrons, relying upon prior initial orders issued by the Office of Administrative Hearings, *Out-A-Bounds*, 2012-LCB-0028, *D-Song*, 2012-LCB-0017, and *Olut*, 2013-LCB-0039. All three are distinguishable on their facts. A review of each reveals that the administrative complaints for over-service were dismissed on grounds other than deference to staff. In each case, licensees or bar staff provided credible evidence that they had knowledge of a condition which would explain the alleged apparently intoxicated person's outward signs of intoxication.

5.5 The liquor laws and regulations provide no basis for giving deference to licensees or employees in the evaluation of the apparent intoxication of regular patrons. RCW 66.44.200 prohibits the sale of alcohol to apparently intoxicated persons with no differentiation among types of patrons (regular or unknown). Similarly, WAC 314-16-150 does not provide special criteria for the evaluation of regular patrons.

5.6 Here, the staff at the Mukilteo Lodge had the same opportunity to view Hubbard's behaviors as Greenfield and Telco. The excuse that Hubbard was tired from the work week or the explanation that he is normally a loud and abrasive person does not obviate the direct observations of the Liquor Control Board officers that Hubbard exhibited signs of intoxication. His behaviors were consistent with being intoxicated: his speech was slurred; his movements were slow and deliberate; he had balance issues and staggered slightly. The bar manager described him as "buzzed."

5.7 The weight of credible evidence establishes that Hubbard was apparently intoxicated at the time Wilson served him alcoholic beverages at the Mukilteo Lodge on or about June 28, 2013.

Penalties

5.8 Respondent Mukilteo Lodge: Over-serving alcohol in violation of RCW 66.44.200 is a Group 1 violation against public safety. WAC 314-29-020. Group 1 violations are considered the most serious because they present a direct threat to public safety. The penalty for a second violation of RCW 66.44.200 within a two-year period is a seven-day suspension *Id.* Because the Respondent violated RCW 66.44.200 in February 2012, less than two years from the violation presently at issue, the Respondent's liquor license should be suspended for seven days.

5.9 Respondent Wilson: Wilson has no prior violations. Under RCW 314-17-105, a first time violation for allowing an apparently intoxicated person to possess or consume alcohol is a five-day suspension of the MAST permit or a \$100.00 fine.

VI. INITIAL ORDER

IT IS HERBY ORDERED THAT:

6.1 Respondent Mukilteo Lodge LLC d/b/a Mukilteo Lodge Sports Grille violated WAC 314-16-150 in serving an apparently intoxicated person on June 28, 2013. Because this is a second violation for the Respondent within a two-year period, the Appellant's liquor license is hereby suspended for seven days under WAC 314-29-020.

6.2 Respondent Eric Wilson violated WAC 314-16-150 in serving an apparently intoxicated person on June 28, 2013. Because this is the Respondent's first violation, the standard penalty of a five (5) day suspension of the MAST permit or a \$100 monetary fine is imposed.

Signed and Issued at Tacoma, Washington, on the date of mailing.

A handwritten signature in black ink, appearing to read "Jane Cantor Shefler".

Jane Cantor Shefler
Administrative Law Judge
Office of Administrative Hearings

NOTICE OF APPEAL RIGHTS – PLEASE READ CAREFULLY

Petition for Review of Initial Order

Either the licensee or permit holder or the assistant attorney general may file a petition for review of the initial order with the Liquor Control Board within **twenty (20) days of the date of service of the initial order.** RCW 34.05.464; WAC 10-08-211; WAC 314-42-095.

The petition for review must:

- (i) Specify the portions of the initial order to which exception is taken;
- (ii) Refer to the evidence of record which is relied upon to support the petition; and
- (iii) Be filed with the liquor control board within twenty (20) days of the date of service of the initial order.

A copy of the petition for review must be mailed to all of the other parties and their representatives at the time the petition is filed. **Within ten (10) days after service of the petition for review, any of the other parties may file a response to that petition with the Liquor Control Board.** WAC 314-42-095(2)(a) and (b). Copies of the reply must be mailed to the all other parties and their representatives at the time the reply is filed.

Address for filing a petition for review with the board:

Washington State Liquor Control Board
Attention: Kevin McCarroll
3000 Pacific Avenue
PO Box 43076
Olympia, Washington 98504-3076.

Final Order and Additional Appeal Rights: The administrative record, the initial order, any petitions for review, and any replies filed by the parties will be circulated to the board members for review. WAC 314-42-095(3).

Following this review, the board will enter a final order. WAC 314-42-095(4). Within ten days of the service of a final order, any party may file a petition for reconsideration with the board, stating the specific grounds upon which relief is granted. RCW 34.05.470; WAC 10-08-215.

The final decision of the board is appealable to the Superior Court under the provisions of RCW 34.05.510 through 34.05.598 (Washington Administrative Procedure Act).

CERTIFICATION OF MAILING IS ATTACHED


CERTIFICATE OF SERVICE FOR OAH DOCKET NO. 2014-LCB-0042

I certify that true copies of this document were served from Tacoma, Washington upon the following as indicated:

Eric Wilson 4304 152 nd St. SW Lynnwood, WA 98087 Respondent	<input checked="" type="checkbox"/> First Class Mail, Postage Prepaid <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Hand Delivery via Messenger <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail
Shawn Roten Mukilteo Lodge, LLC 7928 Mukilteo Speedway, Ste 101 Mukilteo, WA 98275 Respondent	<input checked="" type="checkbox"/> First Class Mail, Postage Prepaid <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Hand Delivery via Messenger <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail
Jennifer Elias Office of the Attorney General PO Box 40100 Olympia, WA 98504 Fax: (360) 664-0229 Agency Representative	<input checked="" type="checkbox"/> First Class Mail, Postage Prepaid <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Hand Delivery via Messenger <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail
Charles Rullman Foster Pepper PLLC 1111 3 rd Ave., Suite 3400 Seattle, WA 98101 Respondent Representative	<input checked="" type="checkbox"/> First Class Mail, Postage Prepaid <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Hand Delivery via Messenger <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail

Date: Tuesday, November 25, 2014

OFFICE OF ADMINISTRATIVE HEARINGS


Dora R Fitzpatrick
Legal Secretary

RECEIVED
DEC 15 2014
Liquor Control Board
Board Administration

STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE LIQUOR CONTROL BOARD

In the Matters of:

MUKILTEO LODGE LLC dba MUKILTEO
LODGE SPORTS GRILLE

License No. 405490
AVN No. 3G3179A

and

ERIC WILSON,

Permit No. 120 483 074
AVN No. 3G3179B

Respondents.

OAH Docket Nos. 2014-LCB-0042

Agency Nos. L-24,799
L-24,795

**RESPONDENTS' PETITION FOR
REVIEW OF INITIAL ORDER**

[RCW 34.05.464; WAC 10-08-11; WAC 314-42-095]

I. INTRODUCTION

Pursuant to RCW 34.05.464 and WAC 314-42-095, Respondents the Mukilteo Lodge Sports Grille (the "Lodge") and Eric Wilson (together, "Respondents") respectfully petition the Liquor Control Board to review the Initial Order issued in this action on November 25, 2014. The Initial Order finds that Respondents violated WAC 314-29-020 by permitting the service of alcohol to an apparently intoxicated person, patron Ryan Hubbard, on June 28, 2013. The Initial Order suffers from two serious defects.

First, the Initial Order purports to resolve conflicting testimony submitted at the October 29, 2014 hearing from the Enforcement Officers, Sergeant Steve Grassfield and Officer Steve

RESPONDENTS' PETITION FOR REVIEW
OF INITIAL ORDER - 1

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206) 447-9700

1 Telstad (the "Officers"), on the one hand, and the bar staff and patron (Mr. Hubbard), on the
2 other. In particular, the Officers and Respondents' witnesses disputed whether Mr. Hubbard's
3 behavior was indicative of inebriation or, rather, his boisterous personality. Both sides claimed to
4 be in the better position to assess Mr. Hubbard, particularly in light of his status as a regular
5 patron who was well-known to the bar staff. The Administrative Law Judge ("ALJ") evidently
6 made a credibility determination in favor of the Officers.

7 Here's the problem: Respondents disclosed their intention to call waitress Whitney
8 Paterno to testify regarding the Officers' behavior in the bar before they confronted Mr.
9 Hubbard. Ms. Paterno was prepared to testify about how the Officers quizzed her about whether
10 *she* was intoxicated and drinking on the job. These accusations, which were repeated at length,
11 were wildly false. The questions continued to the point that Ms. Paterno became upset and
12 reported the situation to her supervisor. Making matters worse, Officer Grassfield was incapable
13 of looking anywhere other than Ms. Paterno's chest during the exchange. Ms. Paterno eventually
14 changed her shirt because she was so uncomfortable.

15 None of that testimony was heard. At the hearing, Ms. Paterno was permitted to testify
16 *only* about Mr. Hubbard, wherein she confirmed that he was not displaying signs of inebriation.
17 However, at the moment Ms. Paterno began testifying about the Officers' behavior and prior,
18 mistaken observations, the ALJ sustained a relevancy objection from the Assistant Attorney
19 General that concluded Ms. Paterno's testimony. Counsel for Respondents nonetheless made an
20 offer of proof as to why Ms. Paterno should be heard on the question of the Officers' judgment,
21 reliability, and observational skills – all matters that are clearly relevant to this action.

22 Second, in addition to excluding directly relevant testimony, the ALJ failed to give
23 appropriate and necessary deference to the observations of the Lodge's bar staff, who had
24 observed Mr. Hubbard 3-4 times per week for the prior year. Disputed questions of fact should
25 have been resolved in favor of the licensees who had the superior knowledge and vantage point
26 for the situation, as in *Out-A-Bounds*, OAH Docket No. 2012-LCB-0028, LCB No. 24,071

1 (2012) and *D-Song LLC*, OAH Docket No. 2012-LCB-0017, LCB No. 24,052 (2012). By
2 requiring otherwise, the Initial Order places the Lodge in the untenable position of ever serving
3 alcohol to a loud-mouth customer. That is not what the Washington Legislature envisioned.

4 In sum, this was a case where witness credibility and judgment were critical, but the ALJ
5 refused to hear all relevant testimony. On top of that, she failed to give appropriate weight to the
6 testimony of well-trained bar staff who had observed a regular patron. This is grounds for a
7 further hearing by the Board and reconsideration of the Initial Order with the benefit of a
8 complete record.

9 **II. EVIDENCE PRESENTED AT THE HEARING**

10 At the hearing on October 29, 2014, the Lodge and Mr. Wilson presented testimony of
11 the following persons: Wes Reed, shift manager (by declaration); Eric Wilson, bartender (live
12 testimony); Whitney Paterno, cocktail waitress (live testimony); and Ryan Hubbard, regular bar
13 patron (live testimony). These witnesses gave sworn testimony that Mr. Hubbard was not
14 apparently intoxicated when he was confronted by the Officers at 9:00 p.m. on June 28, 2013 at
15 the Lodge, nor was there any legitimate reason for the Officers to believe he was intoxicated.

16 The evidence that was not presented at the Hearing, because the ALJ refused to allow its
17 introduction, was that the Officers spent the prior hour at the Lodge making false accusations of
18 intoxication against a waitress, Ms. Paterno, who was also subjected to offensive leering.

19 **III. OVERVIEW OF THE FACTS**

20 **A. The LCB Officers Mistakenly Concluded that Hubbard was Intoxicated.**

21 In 2013, Mr. Hubbard, then age 31, was a regular patron at the Lodge. (*Hubbard*
22 *Testimony*, 10/29/14[“*Hubbard*”].) He worked nearby for an aviation electronics company and
23 he visited the bar a few times per week. (*Id.*) Mr. Hubbard had a reputation at the Lodge for
24 being loud and somewhat confrontational, even obnoxious. (*Id.*; *see also Wilson Testimony*,
25 10/29/14 [“*Wilson*”], and *Paterno Testimony*, 10/29/14 [“*Paterno*”].) This was his general
26

1 demeanor, regardless of whether he had been drinking. (*Id.*) Nonetheless, Mr. Hubbard was a
2 good customer at the Lodge and he never caused problems. (*Id.*)

3 On Friday, June 28, 2013, Mr. Hubbard visited the Lodge between 6:30 and 7:00 p.m.
4 (*Hubbard.*) He had finished a long week of work and he was tired. (*Id.*) He sat at the bar with
5 one male and two female acquaintances for a couple of hours making conversation. (*Id.*) While
6 at the bar, Mr. Hubbard drank three Diamond Knot beers and a glass of white wine. (*Id.*) Around
7 9:00 p.m., Mr. Hubbard's male companion ordered a round of shots for the group, but Mr.
8 Hubbard declined the drink. (*Id.*; *see also Wilson.*)

9 Eric Wilson was bartending at the Lodge on the night of June 28, 2013. (*Wilson.*) He had
10 been a bartender for four and a half years, and he had never been cited for the over-service of
11 alcohol. (*Id.*) Mr. Wilson directly engaged with Mr. Hubbard throughout the evening and he
12 concluded unequivocally that Mr. Hubbard was not exhibiting signs of intoxication. (*Id.*)

13 Before departing the bar for the night, Mr. Hubbard went outside to smoke a cigarette.
14 (*Hubbard.*) At that point, Mr. Hubbard was confronted by the two plain-clothes LCB officers
15 identified as Steve Telstad and Steven Grassfield. (*Id.*) They instructed Mr. Hubbard to
16 accompany them to the darkened entry of the Lodge. (*Id.*) The officers demanded that Mr.
17 Hubbard produce identification, but he refused. (*Id.*) He felt threatened by their questioning and
18 he knew that he had done nothing wrong. (*Id.*) He even asked if he needed a lawyer before
19 answering their questions, particularly because he was currently involved in a dissolution and
20 custody proceeding. (*Id.*)

21 While Mr. Hubbard was speaking with the LCB officers, Wes Reed, the shift manager,
22 approached the group. (Declaration of Wes Reed, 10/28/14.) Mr. Reed knew Mr. Hubbard as a
23 regular patron and he encouraged Mr. Hubbard to cooperate with the officers. (*Id.*) Mr. Hubbard
24 relented and provided his identification. (*Id.*) He was then told that he was free to go. (*Id.*) Mr.
25 Reed conveyed to the LCB officers that Mr. Hubbard was not intoxicated—if anything, he was
26 “a little buzzed.” (*Id.*)

1 **B. The Lodge Strictly Enforces Its Alcohol Consumption Policy.**

2 The Lodge specifically instructs its employees about their responsibilities for serving
3 alcohol. (*Wilson.*) All employees, including Wilson, receive and have read a copy of the Lodge's
4 Alcohol Consumption Awareness Policy, which states:

- 5 • "If a person appears intoxicated, the server, bartender, or manager will pull the
6 guest's alcoholic beverage and replace it with a non-alcoholic beverage."
7 • "Serving persons who are visibly intoxicated is against the law. We strive to keep this
8 from happening by: Pulling a drink of someone who is visibly intoxicated and
9 offering them a non-alcoholic beverage."

10 (*Wilson.*) Similarly, the Lodge maintains strict Bartending Service Standards that emphasize the
11 importance of declining service to anyone who appears intoxicated:

- 12 • "Service staff and the Mukilteo Lodge are equally responsible for the following rules
13 regarding the service of alcoholic beverages: Serving an intoxicated guest."
14 • "If a guest comes in and appears intoxicated they may NOT be served alcoholic
15 beverages. If a guest who is drinking starts to exhibit signs of intoxication their drink
16 must be removed and offer the guest a non-alcoholic beverage. Any time a guest
17 appears intoxicated notify the Manager on Duty immediately and communicate the
18 guest's drinking status to other service members."

19 (*Wilson.*)

20 **C. The LCB Officers Harassed a Cocktail Waitress.**

21 As stated in Respondent's Prehearing Brief, Ms. Paterno was prepared to testify that the
22 officers spent an hour at the Lodge before contacting Mr. Hubbard, but they did not identify
23 themselves as officers. (Statement of Whitney Paterno ["Paterno Statement"], 06/28/13.)
24 Cocktail waitress Whitney Paterno offered to take their drink orders on multiple occasions, but
25 they declined. (*Id.*) Instead, the officers quizzed Ms. Paterno about whether she was intoxicated
26 and drinking on the job. (*Id.*) These accusations were wildly false. (*Id.*) The questions continued

1 to the point that Ms. Paterno became upset and reported the situation to Mr. Reed. (*Id.*) Making
2 matters worse, Officer Grassfield was incapable of looking anywhere other than Ms. Paterno's
3 chest. (*Id.*) Ms. Paterno eventually changed her shirt because she was so uncomfortable. (*Id.*)

4 At the hearing, the Assistant Attorney General objected to Ms. Paterno's anticipated
5 testimony as relevant. Counsel for Respondents made an offer of proof that Ms. Paterno's
6 testimony is directly relevant to the Officers' judgment, reliability, and observational skills. The
7 offer of proof was rejected and Ms. Paterno was forbidden from testifying on these critical
8 subjects.

9 **IV. APPLICABLE AUTHORITY AND ANALYSIS**

10 RCW 34.05.464 provides that a licensee may petition for review of an Initial Order. The
11 Petition must "(i) [s]pecify the portions of the initial order to which exception is taken; and (ii)
12 [r]efer to the evidence of record which is relied upon to support the petition." WAC 314-42-095.
13 Here, Respondents take exception to two aspects of the Initial Order: (1) the exclusion on
14 relevancy grounds of testimony by Whitney Paterno regarding the Officers' judgment, reliability,
15 and observational skills; and (2) the ALJ failure to resolve disputed questions of fact in favor of
16 Respondents who had the superior knowledge and observations of their regular patron, Mr.
17 Hubbard.

18 **A. The Administrative Law Judge Erred by Excluding the Full Testimony of Whitney**
19 **Paterno.**

20 With limited exceptions, none of which apply here, "[a]ll relevant evidence is
21 admissible." ER 402. A court commits reversible error if it refuses to admit testimony that has a
22 "reasonable possibility" of changing the outcome of a case. *See State v. Fankhouser*, 133 Wn.
23 App. 689, 695, 138 P.3d 140 (2006) (reversing decision of trial court that refused to admit
24 relevant testimony because the "trial court's ruling excluding [the witness'] testimony severely
25 hampered [the defendant's] ability to challenge [another witness'] credibility"). Thus, the
26

1 exclusion of witness testimony that is directly relevant to the critical subjects of witness
2 credibility, judgment, and observations is a reversible error.

3 Here, the ALJ refused to allow Ms. Paterno to testify how the Officers spent the prior
4 hour at the Lodge, before contacting Mr. Hubbard, making false accusations of intoxication
5 against her. At the hearing, the Officers conceded that they believed Ms. Paterno was inebriated
6 on the night of June 28, 2013, but Respondents were not allowed to pursue questioning of Ms.
7 Paterno about how very wrong their observations had been. This is reversible error and the Initial
8 Order should be reconsidered in light of a complete record, upon further hearing and
9 examination.

10 **B. Certain Deference Should be Afforded to Licensees Who are in the Best Position to**
11 **Observe and Evaluate Regular Patrons.**

12 RCW 66.44.200(1) makes it unlawful for a licensed establishment to serve alcohol to
13 "any person apparently under the influence of liquor." In *Barrett v. Lucky Seven Saloon, Inc.*,
14 152 Wn.2d 259, 273-74 (2004), the Washington Supreme Court held that "apparently under the
15 influence" means "readily perceptible to the senses" and "capable of being readily perceived by
16 the sensibilities or understanding as certainly existent or present." The Court later clarified that
17 to prove someone is apparently intoxicated, the state must offer "direct, observational evidence
18 at the time of the alleged over-service or by reasonable inference deduced from observation
19 shortly after the over-service." *Faust v. Albertson*, 167 Wn.2d 531, 539 (2009).

20 In over-service cases involving "regular" bar patrons, bartenders and service staff are
21 often in the best position to determine whether the patron was intoxicated. The employees will be
22 aware of unique characteristics about the patron's personality that an LCB officer might
23 misinterpret based on limited observations. For example, in the administrative matters of *Out-A-*
24 *Bounds*, OAH Docket No. 2012-LCB-0028, LCB No. 24,071 (2012) and *D-Song LLC*, OAH
25 Docket No. 2012-LCB-0017, LCB No. 24,052 (2012), administrative judges dismissed
26 complaints for alleged over-service involving customers who regularly frequented the licensees.

1 In *Out-A-Bounds*, the patron who was alleged to have been over-served was observed being loud,
2 overly-friendly, abrupt, and annoying. The LCB officers perceived these characteristics as
3 signifying intoxication, but each member of the bar staff testified that the patron always behaved
4 this way—even when sober. Crediting the employee testimony over the testimony of the LCB
5 officers who had never met the patron, the court determined that the patron was not “apparently
6 intoxicated” and therefore dismissed the Administrative Violation Notice (“AVN”).

7 Similarly, in *D-Song LLC*, the patron was a bar regular who had a lisp that made him
8 difficult to understand, even when he had not been drinking. Noting that the officers who issued
9 the over-service citation had never met the patron before, the court placed greater weight on the
10 testimony of the servers and bartenders who interacted with the patron on a regular basis. As the
11 patron had only engaged in his “normal” behavior, the court found that there was insufficient
12 evidence to support a violation for over-service and dismissed the AVN.

13 Courts will also rely on external factors that influence behavior in order to determine if a
14 person was “apparently intoxicated.” In *OLUT, Inc.*, OAH Docket No. 2013-LCB-0039, LCB
15 No. 24,724 (2013), LCB officers issued an over-service violation because a patron appeared
16 extremely tired, did not seem to be aware of his surroundings, and had droopy and bloodshot
17 eyes. However, this conduct was readily explained by the fact that the patron in question had
18 recently been hired by Boeing and worked extremely long hours just prior to the incident. The
19 court ultimately dismissed the AVN, determining that the LCB officers mistook the patron’s
20 exhaustion for signs of drunkenness.

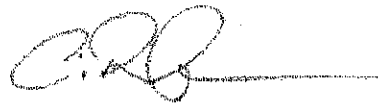
21 Just as in the *Out-A-Bounds*, *D-Song LLC*, and *OLUT* cases, the ALJ should have given
22 deference to the trained observations of the Lodge’s bartender and shift manager, both of whom
23 had better knowledge of Mr. Hubbard’s behavior and personality than the Officers. For some
24 customers, being loud and confrontational is a telltale sign of intoxication. But not for Mr.
25 Hubbard—this is simply part of his personality, as testified to by four witnesses. The Officers
26

1 rushed to the conclusion that Mr. Hubbard was intoxicated, just like they convinced themselves
2 that Ms. Paterno had been drinking on the job. They were wrong on both counts.

3 **V. CONCLUSION**

4 Respondents respectfully request review of the Initial Order, which should be
5 reconsidered in light of a complete record, upon further hearing and examination.

6 DATED: December 15, 2014.

7 

8
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18 Attorneys for Mukilteo Lodge, LLC and Eric
19 Wilson
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STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE LIQUOR CONTROL BOARD

In the Matters of:

MUKILTEO LODGE LLC dba MUKILTEO
LODGE SPORTS GRILLE

License No. 405490
AVN No. 3G3179A

Respondent,

and

ERIC WILSON,

Permit No. 120 483 074
AVN No. 3G3179B

Respondent.

OAH Docket Nos. 2014-LCB-0042

Agency Nos. L-24,799
L-24,795

DECLARATION OF SERVICE

I, Colleen Hickman, state that I am a citizen of the United States of America and a resident of the State of Washington, I am over the age of twenty one years, I am not a party to this action, and I am competent to be a witness herein. I declare that I caused to be served in the manner noted copies of the following upon designated counsel:

1. Respondents' Petition for Review of Initial Order; and
2. This Declaration of Service.

Jennifer Elias
Office of Attorney General
PO Box 40100
Olympia, WA 98504
Email: JenniferE2@ATG.WA.GOV

☐ Via Federal Express
☒ US Mail
☒ Via Email

Washington State Liquor Control Board
Attn: Kevin McCarroll
3000 Pacific Avenue
P O Box 43076
Olympia, WA 98504-3076
Fax: 360-586-3190

☒ Via Federal Express
☐ US Mail
☐ Via Email
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DECLARATION OF SERVICE - 1

FOSTER PEPPER PLLC
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SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206) 447-9700

1 I DECLARE under penalty of perjury under the laws of the State of Washington that the
2 foregoing is true and correct.

3 DATED this 15th day of December, 2014.
4

5 
6 Colleen Hickman
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DECLARATION OF SERVICE - 2

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RECEIVED

DEC 23 2014

Liquor Control Board
Board Administration

BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD

IN THE MATTER OF:

MUKILTEO LODGE LLC
d/b/a MUKILTEO LODGE SPORTS
GRILLE

7928 MUKILTEO SPEEDWAY STE 101
MUKILTEO, WA 98275-2607

LICENSEE

LICENSE NO. 405490
AVN NO. 3G3179A

IN THE MATTER OF:

ERIC WILSON

4304 - 152ND STREET SW
LYNWOOD, WA 98087-6136

PERMIT HOLDER

PERMIT NO. 120 483 074
AVN NO. 3G3179B

OAH NO. 2014-LCB-0042
LCB Nos. 24,799 and L-24,795

ENFORCEMENT DIVISION'S
REPLY TO LICENSEE'S AND
PERMIT HOLDER'S PETITION
FOR REVIEW OF THE INITIAL
ORDER

The Enforcement and Education Division (Enforcement) of the Washington State Liquor Control Board (Board), by and through its attorneys, ROBERT W. FERGUSON, Attorney General, and JENNIFER ELIAS, Assistant Attorney General, hereby responds to MUKILTEO LODGE, LLC d/b/a MUKILTEO LODGE SPORTS GRILLE's (Licensee) and ERIC WILSON's (Permit Holder) (collectively Respondents) Petition for Review of Initial Order (Petition).

ENFORCEMENT DIVISION'S REPLY
TO LICENSEE'S AND PERMIT
HOLDER'S PETITION FOR REVIEW OF
INITIAL ORDER

1

ATTORNEY GENERAL OF WASHINGTON
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PO Box 40100
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1 Enforcement asserts that the Respondents' Petition lacks the force and merit necessary
2 to overcome the reasoned opinion of the Administrative Law Judge (ALJ). The Initial Order
3 issued by ALJ Shefler is fully supported by the law and evidence in the record, accordingly
4 Enforcement respectfully requests that the Board affirm the Initial Order.

5 **I. PROCEDURAL HISTORY**

6 On July 2, 2013, Enforcement served the Licensee with Administrative Violation
7 Notice (AVN) Number 3G3179A, alleging that on or about June 28, 2013, the Licensee or an
8 employee(s) thereof permitted an apparently intoxicated person to possess and or consume
9 liquor on the licensed premises contrary to WAC 314-16-150. Enforcement's Exhibit 1.
10 Enforcement also issued AVN 3G3179B to bartender and permit holder Eric Wilson alleging
11 that he allowed an apparently intoxicated person to consume alcohol contrary to WAC 314-16-
12 150. Enforcement's Exhibit 6. On or around June 16, 2014, the Liquor Control Board issued
13 the following administrative complaints based on the above-referenced AVNs:

14 **Case Number L-24,799**

15 On or about June 28, 2013, the above-named Licensee or employee(s) thereof
16 permitted an apparently intoxicated person to possess and/or consume liquor on the
17 licensed premises, contrary to WAC 314-16-150.

18 **Case Number L-24,795**

19 On or about June 28, 2013, the above-named Permit Holder, thereof,¹ permitted an
20 apparently intoxicated person to consume liquor on the licensed premises, contrary to
21 WAC 314-16-150.

22 A full hearing on the merits was held by ALJ Jane Shefler in Everett, Washington, on
23 October 29, 2014. ALJ Shefler entered her Findings of Fact, Conclusions of Law, and Initial
24 Order (Initial Order) on November 25, 2014. The ALJ sustained both complaints and ordered
25 that the Licensee's liquor license be suspended for seven days. Initial Order 6.1. In the Initial
26 Order, Mr. Wilson is required pay a \$100.00 monetary fine or serve a five-day suspension of
his MAST permit. Initial Order 6.2.

¹ The complaint issued to Mr. Wilson contains a typographical error as it mistakenly includes the word
"thereof".

II. STANDARD OF REVIEW

Any party in an administrative action may file a petition for review of the initial order pursuant to RCW 34.05.464 and WAC 314-29-010(4). A party filing a petition for review must specify the portions of the initial order to which exception is taken and refer to evidence in the record on which the party relies to support the petition. WAC 314-29-010(4).

In reviewing the initial order, the Board "shall exercise all the decision-making power that the reviewing officer would have had to decide and enter the final order had the reviewing officer presided over the hearing[.]" RCW 34.05.464(4). In reviewing findings of fact by presiding officers, a reviewing officer "shall give due regard to the presiding officer's opportunity to observe the witnesses." *Id.* Therefore, the Board is not bound by an ALJ's Findings of Facts or Conclusions of Law in the Initial Order, but the licensee has the burden of demonstrating that the ALJ's initial order is inconsistent with the administrative record.

The Respondents' Petition fails to identify specific portions of the Initial Order to which it has taken exception. Nonetheless, Enforcement will address each of the Respondents' assertions below.

III. DISCUSSION

A. No Deference is Due to Bar Staff's Evaluation of Mr. Hubbard.

In Conclusion of Law 5.5, ALJ Shefler correctly held that liquor laws provide no basis for giving deference to a licensee's or employee's evaluation of the apparent intoxication of regular patrons. Neither RCW 66.44.200 nor WAC 314-16-150 provide for different treatment of regular patrons or allow the tribunal to give deference to the licensee's or staff's evaluation of such patrons. Bar staff are in the same position as liquor enforcement officers to observe the signs of apparent intoxication. In this case, staff at Mukilteo Lodge had the same opportunity to observe Mr. Hubbard as Sgt. Grassfield and Officer Telstad.

Similarly, in Conclusion of Law 5.4, ALJ Shefler held that deference is not due to bar staff under recent initial orders. ALJ Shefler rejected the Respondents' argument that the

1 present case is similar to the prior initial orders in *Out-of Bounds*, 2012-LCB-0028, *D-Song*,
2 2012-LCB-0017, and *Olut*, 2013-LCB-0039. ALJ Shefler properly held that the prior cases
3 were dismissed on grounds other than deference to bar staff. Instead, in each case, the licensee
4 or bar staff provided credible evidence on the record which explained the patron's outward
5 signs of apparent intoxication. Conclusion of Law (COL) 5.4. Conversely, in the present case,
6 the Respondents have repeatedly argued simply that Mr. Hubbard was not intoxicated, that he
7 works long hours as a machinist, and is generally obnoxious and loud. This explanation was
8 rejected by the ALJ. COL 5.6. ALJ Shefler found that "the excuse that Hubbard was tired
9 from a work week or the explanation that he is normally a loud and abrasive person does not
10 obviate the direct observations of the Liquor Control Board officers that Hubbard exhibited
11 signs of intoxication." COL 5.6. The Respondents have failed to demonstrate that Conclusion
12 of Law 5.6 is incorrect or unsupported by evidence in the record.

13 **B. All Testimony Relevant to the Board's Complaints was Heard at the Hearing.**

14 The exclusion of Ms. Whitney Paterno's testimony regarding matters unrelated to the
15 present administrative complaint was proper. The Respondents argue that the outcome of the
16 present case would be different if Ms. Paterno had been allowed to give testimony on her
17 observations of the Liquor Control Board officers on June 28, 2013. Ms. Paterno testified at
18 the hearing that she had little or no interaction with Mr. Hubbard on June 28, 2013 and that she
19 does not like to serve Mr. Hubbard generally.² Ms. Paterno had no other testimony relevant to
20 the complaints.

21 Sergeant Steve Grassfield and Officer Steve Telstad testified that they asked
22 Ms. Paterno whether she had been drinking and when she replied that she had not, ceased their
23 inquiry. At most, the officers estimated that their questions lasted a minute or two. There is no
24 support in the record for the Respondents' allegations that Ms. Paterno was questioned for an
25 hour by the Liquor Enforcement officers. Petition at 3. The Respondents cross-examined both

26 ² Ms. Paterno testified telephonically at the hearing.

1 officers and did not solicit any responses which indicated that the officers engaged in a
2 prolonged examination of Ms. Paterno. Ms. Paterno's allegations against Sgt. Grassfield are
3 prejudicial and irrelevant to the present case. Any complaints regarding officer conduct could
4 and should have been directed to the Liquor Control Board, not raised in the administrative
5 hearing.

6 **C. Finding of Fact 4.24 Correctly Finds that Mr. Hubbard Arrived at the Lodge at**
7 **5:30 p.m. on June 28, 2013.**

8 Finding of Fact 4.24 is supported by facts in the record. The Respondents argue that
9 Mr. Hubbard did not arrive at Mukilteo Lodge until 6:00 or 7:00. The testimony of Eric
10 Wilson establishes that Mr. Hubbard arrived at 5:30, as Mr. Wilson testified that Mr. Hubbard
11 was at the bar when Mr. Wilson got his dinner from the kitchen at 5:30. Additionally, bar
12 manager Wes Reed provided a statement on June 28, 2013, which states that Mr. Hubbard
13 arrived at the premises at 5:30 and outlines the times and types of drinks Mr. Hubbard
14 purchased. Respondents' Exhibit A, Respondents' Exhibit K.³

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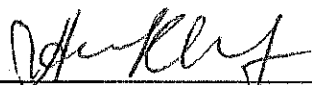
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25 ³ Mr. Reed did not testify at the hearing. His statement from June 28, 2013 appears twice in the exhibits,
26 once in Licensee's Exhibit A as a hand-written statement and again in Respondents' Exhibit K, as a typed version.
Mr. Reed made an additional declaration on October 27, 2014 that appears as Respondents' Exhibit L.

1 IV. CONCLUSION

2 For the reasons set forth above, Enforcement respectfully requests that the Board enter
3 a Final Order affirming the findings of fact and conclusions of law set forth in the Initial Order,
4 and imposing the standard penalties on both the Licensee and Permit Holder.

5 DATED this 23rd day of December, 2014.

6 ROBERT W. FERGUSON
7 Attorney General

8  - 42344
9 FOR JENNIFER ELIAS, WSBA #36334
10 Assistant Attorney General

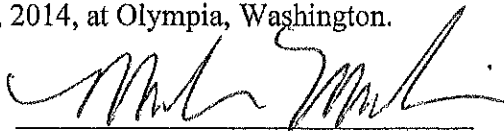
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13 PROOF OF SERVICE

14 I certify that I served a true and correct copy of this document on all parties or their
15 counsel of record on the date below via electronic mail and by placing same in the U.S. mail
16 and state Consolidated Mail Service with proper postage affixed to:

17 CHARLES P. RULLMAN
18 BRYCE C. BLUM
19 FOSTER PEPPER, PLLC
20 1111 THIRD AVE., SUITE 3400
21 SEATTLE, WA 98101-3299
22 rullc@foster.com
23 blumb@foster.com

24 I declare under penalty of perjury under the laws of the state of Washington that the
25 foregoing is true and correct.

26 DATED this 23rd day of December, 2014, at Olympia, Washington.


MARLENA MULKINS
Legal Assistant